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**UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA**

PAMELA THOMPSON, Individually)	CASE NO.: C 07-05437 PJH
and as Personal)	
Representative of CHARLES)	[Sonoma County Superior Court
THOMPSON, Deceased,)	Case No. 241544]
Plaintiff,)	
vs.)	DEFENDANT'S NOTICE OF MOTION
CONSECO SENIOR HEALTH)	AND MOTION FOR AN ORDER
INSURANCE COMPANY, a)	COMPELLING MEET AND CONFER
Pennsylvania corporation,)	AND/OR ENFORCING SETTLEMENT;
DOES 1 through XX)	REQUEST FOR SANCTIONS;
Defendant(s).)	EVIDENCE IN SUPPORT OF MOTION
_____)	DATE: October 29, 2008
	TIME: 9:00 a.m.
	CTRM: 3
	[FILED CONCURRENTLY WITH
	MOTION TO CHANGE TIME]

Assigned to the Honorable
Phyllis J. Hamilton

**TO: THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF
CALIFORNIA AND TO THE INTERESTED PARTIES AND THEIR ATTORNEYS OF
RECORD:**

Please take notice that on October 29, 2008, at 9:00 a.m. or
as soon thereafter as the matter may be heard, in Courtroom 3,
17th Floor of the above entitled court, located at the U.S.

1 Courthouse, 450 Golden Gate Avenue, San Francisco, California,
2 defendant Conseco Senior Health Insurance Company ("defendant")
3 will move the court for an order:

4 1. compelling plaintiff's attorney to meet and confer with
5 defendant's attorney, to resolve differences which have arisen
6 with respect to the language of the Release and Settlement
7 Agreement, which was provided to plaintiff's attorney, by
8 defendant's attorney, pursuant to the memorandum of settlement
9 prepared at the time of the mediation of this matter on May 29,
10 2008 and/or;

11 2. enforcing the settlement entered into by the parties in
12 this action, including but not limited to, ordering plaintiff and
13 her attorney to execute the Release and Settlement Agreement
14 provided to plaintiff's attorney, by defendant's attorney,
15 pursuant to the memorandum of settlement prepared at the time of
16 the mediation of this matter on May 29, 2008, with such
17 modifications, if any, as the court deems appropriate, and/or;

18 3. enforcing the settlement entered into by the parties in
19 this action, including but not limited to, entering judgment on
20 the terms of the Release and Settlement Agreement provided to
21 plaintiff's attorney by defendant's attorney, pursuant to the
22 memorandum of settlement prepared at the time of the mediation of
23 this matter on May 29, 2008, with such modifications, if any, as
24 the court deems appropriate, and/or;

25 4. that plaintiff and/or her attorney pay sanctions of
26 \$4,800, or such amount as the court deems appropriate, pursuant
27 to 28 U.S.C. §1927 and/or the authority of the court to award

1 sanctions on a motion to enforce a settlement, with respect to
2 their conduct, in necessitating the bringing of this motion.

3 Said motion will be based on this notice, the pleadings,
4 records and documents on file in this action, the evidence
5 presented in support of the motion, as well as such oral and
6 documentary evidence as may be presented at the hearing of the
7 motion.

8
9 DATED: September 2, 2008

LAW OFFICES OF MARC J. WODIN

10
11 By /s/ Marc J. Wodin
12 MARC J. WODIN
13 Attorneys for Defendant CONSECO
14 SENIOR HEALTH INSURANCE COMPANY
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MEMORANDUM OF POINTS AND AUTHORITIES**I. Introduction**

The parties mediated this case at the office of the mediator, and reached a settlement. Common to such a circumstance, where it is not feasible to then and there prepare a formal, written settlement agreement, the parties and their attorneys signed a cursory, five sentence memorandum, which stated essential terms of the settlement, to make the settlement binding, with the express proviso that defendant would prepare a Release and Settlement Agreement, which plaintiff and her attorney would sign.

Defendant thereafter prepared a comprehensive Release and Settlement Agreement - defendant's standard Agreement (defendant's attorney told plaintiff's attorney, at the mediation, that defendant had such an agreement) - modified, in certain respects, for the particulars of the settlement, and with provisions, terms and language, usual and appropriate to such a document; and provided it to plaintiff's attorney, for his consideration.

When plaintiff's attorney wrote, expressing "concern" with the language of two of the provisions, defendant's attorney - again, as is usual to such a circumstance - promptly wrote back that he was happy to consider changes to the language of the Agreement, and requested that plaintiff's attorney call, so that they could do so. Plaintiff's attorney did not respond to that request, or two follow up letters, asking that he call so they could resolve matters related to the language of the Agreement.

1 Rather, after ignoring the three letters, plaintiff's
2 attorney wrote, taking a new position (inconsistent with his
3 prior position, wherein he only expressed concern about two of
4 the provisions), now asserting that the five sentence memorandum
5 prepared at the mediation, was the settlement agreement, and
6 there could be no formal, comprehensive settlement agreement,
7 setting forth the settlement, comprehensively and in detail, with
8 provisions, terms and language appropriate to such a document.

9 Defendant's attorney responded, disagreeing with that
10 assertion:

11 An agreement to settle is interpreted according to the
12 ordinary rules applicable to the interpretation of contracts
13 generally. That means that it will be interpreted to effectuate
14 the intent of the parties, based on the language used, and in
15 consideration of the surrounding circumstances under which it was
16 prepared.

17 Plaintiff's assertion is contrary to the language of the
18 memorandum, and the circumstances under which it was prepared,
19 and is unreasonable.

20 The memorandum says that defendant will provide a Release
21 and Settlement Agreement. Further, it does not say that the
22 Agreement will be limited to a literal recitation of the five
23 sentences in the memorandum. In fact, it does not place any
24 specific limitation on the provisions, terms and language of the
25 Agreement. Further, it is reasonable that such a document would
26 include provisions, terms and language usual and appropriate to
27 such a document.

1 Further, the circumstances under which the memorandum was
2 prepared are consistent with such an interpretation, and
3 inconsistent with plaintiff's assertion. The memorandum was
4 prepared at a mediation, where it was not feasible to then and
5 there prepare a formal written settlement agreement, with
6 essential terms stated in cursory form, signed by the parties to
7 make the settlement binding, with an express proviso that the
8 defendant would thereafter provide the formal Release and
9 Settlement Agreement, which plaintiff and her attorney would
10 sign.

11 Defendant's attorney requested for the fourth time, that
12 they meet and confer in an attempt to resolve differences over
13 the language of the Release and Settlement Agreement. Once again,
14 plaintiff's attorney ignored the request.

15 This court has the authority to 1. order plaintiff's
16 attorney to meet and confer over the language of the Release and
17 Settlement Agreement provided by defendant's attorney; 2. enforce
18 the settlement, by ordering plaintiff and her attorney to sign a
19 Release and Settlement Agreement, as called for in the
20 memorandum, with any modifications which the court deems
21 appropriate; 3. enforce the settlement, by entering judgment
22 pursuant to the terms of such Release and Settlement Agreement.

23 It is appropriate, in this case, that the court issue such
24 orders.

25 Further, this court has authority to order plaintiff, and
26 her attorney, to pay sanctions, based on their conduct in
27 necessitating the bring of this motion. It is reasonable and
28

appropriate to order such sanctions in this case.

II. There Is Good Cause For This Court To:

(1) Order Plaintiff's Attorney To Meet And Confer With Defendant's Attorney On The Language of The Release And Settlement Agreement Provided by Defendant's Attorney And/Or;

(2) Enforce The Settlement By Ordering Plaintiff And Her Attorney To Execute The Release And Settlement Agreement, With Such Modifications, If Any, As The Court Deems Appropriate And/Or;

(3) Enforce The Settlement By Entering Judgment Pursuant To The Terms Of Such Release And Settlement Agreement

1. Applicable Law

This court can order parties to meet and confer - meaning "to communicate directly and discuss in good faith" - on any matter which is the subject of a motion pending before the court. Ray v. Bluehippo Funding, L.L.C. 2008 WL 3399392 (N.D.Cal.) at p.3 Jones v. Bayer Corp. 2004 WL 2445235 (N.D.Cal.) at p.1

This court has the inherent power, on motion, to enforce a settlement entered into between the parties to an action pending before it. Further, public policy favors the enforcement of settlements. City Equities Anaheim, Ltd v. Lincoln Plaza Development Co. 22 F. 3d 954, 958 (9th Cir. 1994)

"It is now well established that the trial court has power to summarily enforce on motion a settlement agreement entered into by the litigants in which the litigation is pending before it. . . This circuit also

1 recognizes a trial court's inherent enforcement power.
 2 . . The practice of summary enforcement evolved for two
 3 reasons. First is the 'high judicial favor' accorded
 4 the voluntary settlement of disputes. . . Second is the
 5 efficiency of having one court see litigation through
 6 to its conclusion, thereby avoiding duplication of
 7 effort." ¹

8 The enforcement and construction of settlement agreements
 9 is "governed by principles of contract law" which "apply to
 10 contracts generally. . . A settlement agreement is treated as any
 11 other contract for purposes of interpretation." United Commercial
 12 Insurance Services v. Paymaster Corp 962 F.2d 853, 856(9th Cir.
 13 1992); Hermetic Order of the Golden Dawn, Inc. v. Griffin 2008
 14 WL2923403 (N.D.Cal.) at p. 2 (citing California state law)

15 In that regard "the intent of the parties determines the
 16 meaning of the contract," which is the "objective" intent as
 17 "manifested [1] in the agreement and [2] by surrounding conduct."
 18 Id. (again, citing California state law)

19 Consistent with these principles, the court can enforce an
 20 out of court settlement, entered into by the parties, as
 21 expressed in a written document or documents. City Equities
 22 Anaheim, Ltd. v. Lincoln Plaza Development Co., supra, pp. 956-
 23 958 (holding that a "memorandum agreement" which set forth
 24 "material" terms of a settlement, showed an "agreement" and
 25 _____

26 ¹ That is also true under California law. See, e.g. Gregory
 27 v. Hamilton (1978) 219 Cal.App. 3d 1527 (affirming order
 28 enforcing settlement on equitable motion seeking such
 enforcement)

1 "intent to be bound" and was enforceable.^{2 3 4}

2 It is common for a settlement to be reached under
3 circumstances where essential terms are stated, in cursory form,
4 with a proviso that a written settlement agreement will be
5 prepared at a later time, usually by the defendant (which is
6 seeking to "buy its peace," and wants and reasonably needs a

7
8 ²See also: Calcor Space Facility, Inc. v. McDonnell Douglas
9 Corp. 5 Fed Appx. 787,789 (9th Cir. 2001) (holding that a written
10 "memorandum," which was "signed" by the parties, setting forth
11 "material" terms of the settlement showed that there was a
12 "mutual intent to be bound," and thus an enforceable settlement);
13 Bright Beginnings, Inc. v. Care Comm, Inc. 78 F.3d 592 (9th Cir.
14 1996) at pp. 1-4 (holding that written "memoranda" exchanged
15 between attorneys for the parties showed "an objective intent to
be bound" and thus "the existence of a negotiated agreement"
which was enforceable); Dierickx v. Allstate Ins. Co. 15 F. 3d
1084 (9th Cir. 1994), at pp. 2-6 (holding that an "exchange of
faxes" between counsel for the parties, which set forth
"essential terms" showed "mutuality of intent" necessary for a
"binding" agreement, and was enforceable)

16 ³This is likewise true under California law. Assemi v.
17 Assemi (1994) 7 Cal. 4th 896, 905 (noting that, pursuant to Code
18 of Civil Procedure Section 664.6, "the trial court may enter
judgment pursuant to a stipulated settlement, if the stipulation
is made. . . in a writing signed by the parties outside the
presence of the court.")

19 (As discussed hereinafter, the memorandum says that the
20 settlement is enforceable under this section. That doesn't mean
21 that it must be enforced under this section. It doesn't say that
the settlement can only be enforced under this section, and
California law holds that the section, even where it is
22 available, is not exclusive. Kirpatrick v. Beebe (1990) 219
23 Cal.App.3d 1527, 1529 ("Nothing in the language of section 664.6,
suggests it was intended to be exclusive."))

24 ⁴The fact that there are disputed issues related to the
25 existence or terms of the settlement does not prevent the court
26 from enforcing it. The court can, if it deems it appropriate,
conduct an "evidentiary hearing" to determine "whether an
agreement existed, or what its terms were" Doi v. Halekulani
27 Corp., 276 F. 3d 1131, 1139 (9th Cir.) That is also true under
28 California law. Assemi v. Assemi, supra, p. 905

1 formal agreement, with provisions, terms and language which will
 2 reasonably accomplish that purpose, to its satisfaction). In such
 3 circumstances, if the plaintiff or her attorney then fail or
 4 refuse to sign such a written agreement, the court can enforce
 5 the settlement by ordering them to do so. Schiff v. City and
 6 County of San Francisco 2007 WL 2301773 (N.D. Cal., at pp. 3-5)
 7 (ordering plaintiff's attorney to sign a written settlement
 8 agreement provided by the defendant, where settlement terms were
 9 cursorily stated on the record, with a proviso that there would
 10 be a "written settlement agreement" provided thereafter by the
 11 defendant, such a settlement agreement was thereafter drafted by
 12 the defendant's attorney and provided to plaintiff's attorney who
 13 "refused to sign the written agreement."); Armstrong v. City and
 14 County of San Francisco 2004 WL 2713068 at p. 4 (same - ordering
 15 plaintiff to sign)

16 Alternatively, the court can enter judgment on the terms of
 17 the written agreement agreement. Doi v. Halekulani Corp., supra,
 18 pp. 1134-1135, 1137, 1139-1140 (ordering judgment entered
 19 pursuant to the terms of a written settlement, where settlement
 20 terms were cursorily stated on the record, with again, with a
 21 proviso that there would be a "written settlement agreement"
 22 provided thereafter by the defendant, and defendant's attorney
 23 provided a "standard" settlement agreement which plaintiff
 24 "refused to sign.")

25 **2. Discussion: Plaintiff's Refusal And Failure To Carry Out**
 26 **The Terms Of The Settlement, By Obstructing The Completion Of The**
 27 **Release And Settlement Agreement Called For In The Memorandum**

**Prepared At The Mediation, And Refusal To Meet And Confer On The
Language Of The Agreement**

When a settlement is reached at a mediation, it is often not feasible to then and there prepare a comprehensive settlement agreement. To make the settlement binding, the parties and their attorneys often sign a brief memorandum, setting forth essential terms, in cursory, bullet point, form, with a proviso that a settlement agreement - the formal document with the provisions, terms and language appropriate to such - will be prepared thereafter, usually by the defendant, which is seeking to "buy its peace," and reasonably wants provisions, terms and language, which will accomplish that purpose, to its satisfaction. In such circumstances, it is common defendant's attorney to provide a proposed agreement to the plaintiff's attorney, and for the attorneys to meet and confer to resolve any differences that may arise on the language. (Wodin Dec.)

This case was mediated, on May 29, 2008, by the parties and their attorneys, before a private mediator, at the mediator's office. A settlement was reached. (Exs. 1-3; Wodin Dec.)⁵

It not being feasible to then and there prepare a formal written settlement agreement, with all of the language appropriate to such, a cursory (five sentence), bullet point, memorandum, stating essential terms, was prepared and signed by

⁵ The matter was ordered to mediation, and an attorney, Mr. Koepfel, was assigned as the mediator. The mediation proceeded on May 29, 2008, at Mr. Koepfel's office, with plaintiff, her attorney Michael Guta, Steven Huffer as a representative of defendant, and defendant's attorney Marc J. Wodin, present. The parties reached a settlement at the mediation.

1 the parties and their attorneys, to make the settlement binding,
 2 with an express proviso therein that defendant would thereafter
 3 provide a Release and Settlement Agreement, which the plaintiff
 4 and her attorney would sign. (Ex. 3; Wodin Dec.)⁶

5 Defendant's attorney told plaintiff's attorney, at the
 6 mediation, that defendant had a standard Release and Settlement
 7 Agreement, which would be provided. (Wodin Dec.)

8 The mediator certified to the court that the case was
 9 settled, and the court dismissed the case, without prejudice to
 10 the dismissal being vacated, and the case restored to the trial
 11 calendar, if either party certified that agreed upon
 12 consideration was not provided. (Exs. 4-5; Wodin Dec.)

13 On June 16, 2008,⁷ defendant's attorney provided plaintiff's
 14 attorney with a comprehensive Release and Settlement Agreement
 15 ("the Agreement") - defendant's standard Agreement, modified in
 16 certain respects for the particularities of the settlement, with
 17 provisions, terms and language, stated with particularity, usual
 18

19 ⁶The memorandum has the word "Thompson" at the top, and
 20 states:

21 "Defendant will pay plaintiff and her attorneys \$17,500.
 22 Plaintiff will dismiss the entire action with prejudice.
 23 There will be no further claims made under the policy.
Plaintiff and her attorneys will execute a release and
settlement agreement provided by defendant which will include a
provision for confidentiality.

24 The settlement is enforceable pursuant to CCP §664.6."

25 ⁷after the process was delayed, for several weeks, by the
 26 failure of plaintiff's attorney to respond to telephonic requests
 27 from defendant's attorney for a information as to how the
 28 settlement check was to made payable, to be included in the
 Agreement, which information was finally received on June 16,
 2008. (Wodin Dec.)

1 and appropriate to such a document ⁸ - and a Dismissal. (Ex. 6;
2 Wodin Dec.)

3 On June 20, 2008, plaintiff's attorney wrote that he had
4 "concerns" with the language of two of the provisions (a
5 provision which provided for liquidated damages in the event of
6 breach of the confidentiality provision, and a venue provision).
7 (Ex. 7; Wodin Dec.)

8 Defendant's attorney promptly faxed a letter to plaintiff's
9 attorney, saying that he was "happy" to consider any "changes"
10 plaintiff's attorney wanted to make in language, and requesting,
11 that plaintiff's attorney "please call" so that they could
12
13
14

15 ⁸ e.g., the identification of the document, the parties, the
16 action, and statement of the fact of settlement; the amount of
17 payment to be made by and who it would be made to; a timetable
18 for plaintiff to provide the executed Agreement and Dismissal,
19 and for defendant to make payment; that defendant was not
20 responsible for paying any other sums; that defendant was not be
21 responsible to taxing authorities for any tax liability incurred
22 by plaintiff related to the payment; that no further benefits
23 would be paid under the policy; the terms of release; that
24 plaintiff would dismiss the action with prejudice; plaintiff's
25 authority to file the action and dismiss it; that the settlement
26 was not an admission of liability; that plaintiff was not
27 entering into the settlement based on any representation of
28 defendant; that plaintiff was over the age of 18, had read the
Agreement, and was acting after securing the advice of counsel;
that if any part of the Agreement was held to be invalid, it
would not effect the remaining portions; confidentiality of the
settlement and facts and circumstances of the action; venue; that
this was the entire agreement; that the parties would do such
acts as might reasonably be required to carry out the Agreement;
that each party and their attorneys had reviewed the Agreement,
and the rule of ambiguities was not applicable; that the
Agreement could not be modified except in writing signed by the
parties; that the Agreement could be executed in parts.

1 discuss them (Ex. 8; Wodin Dec.)^{9 10}

2 Plaintiff's attorney did not respond. (Wodin Dec.)

3 On June 27, 2008, defendant's attorney faxed a second,
4 follow up, letter to plaintiff's attorney, noting that he had not
5 heard from him, and stressing that they needed to resolve matters
6 related to the language of the release. (Ex. 9; Wodin Dec.)¹¹

7 Plaintiff's attorney did not respond to this letter, either.
8 (Wodin Dec.)

9 After waiting another week, defendant's attorney, on July 3,
10 2008, faxed a third letter, again noting that he had not received
11 a response, and again asking plaintiff's attorney contract him,

12 _____
13 ⁹ "If there are provisions of the release which you wish to
14 have changed, as seems to be the case, then please call me, and I
15 will be happy to discuss them with you. You mention some things
16 in your letter. However, I cannot tell whether those are the only
17 things you have a question about, and it makes no sense to do
18 this on a piecemeal basis."

19 ¹⁰ At the mediation, plaintiff's attorney asked when the
20 settlement check could be provided. Defendant's attorney told him
21 that it was anticipated that the check could be provided within
22 several weeks of his receipt of the executed Agreement and the
23 Dismissal. (Wodin Dec.)

24 In his letter of June 20, 2008, plaintiff's attorney said
25 that it was his understanding that the settlement check would be
26 received within 2 weeks of the mediation, and complained that it
27 had not been provided. (Ex.7; Wodin Dec.)

28 In his responsive letter of June 20, 2008, defendant's
attorney reminded plaintiff's that what he was told, at the
mediation, was that the check could be provided within a few
weeks of his providing the executed Agreement and Dismissal.
Further, it was plaintiff's attorney who had caused a delay, by
failing to provide requested information concerning the payee on
the settlement check, which delayed completion of the Agreement.
(Ex. 8; Wodin Dec.)

¹¹ "I have not heard back from you in response to my letter
of June 20. We need to resolve matter related to the release
language.

1 so they could resolve issues related to the release language.
2 (Ex. 10; Wodin Dec.)¹²

3 Once again, plaintiff's attorney did not respond. (Wodin
4 Dec.)

5 Rather, eleven days later, plaintiff's attorney wrote,
6 asserting a new position (inconsistent with the position
7 expressed in prior letter, that he only had a concern
8 about two of the provisions of the Agreement). He now asserted:

9 1. that the five sentence memorandum prepared at the
10 mediation was the settlement agreement, and that document, with
11 those five sentences all that could be said, to express the terms
12 of settlement - there could be no comprehensive settlement
13 agreement with provisions, terms and language, such as were
14 contained in the Release and Agreement provided by defendant's
15 attorney.

16 2. The only additional thing to be done, according to
17 plaintiff's attorney, was to physically affix to the five
18 sentence memorandum, several sentences of language concerning
19 release and confidentiality, as demanded and phrased by him. (Ex.
20 11; Wodin Dec.)¹³

21 _____
22 ¹² "I have now written two letters to you concerning
23 resolving issues related to the release, to which I have received
24 no response. I have the settlement check. Again, please contact
me so we can resolve these issues."

25 ¹³ As discussed hereinafter, the Agreement provided by
26 defendant's attorney contained language of release, which set
27 forth, with particularity, the releasee, the releasor, and the
28 matters released. Plaintiff's attorney demanded that the language
of release consist of a sentence, which said something about some
unidentified releasor being released from some vague and

1 On July 17, 2008, defendant's attorney faxed a letter to
2 plaintiff's attorney, expressing disagreement with his
3 assertions:

4 1. Agreements for settlement are interpreted under the
5 rules applicable to contracts generally, one of which is that
6 they are interpreted to express the mutual intent of the parties,
7 which is determined from an objective consideration of the
8 language of the document and the circumstances under which it was
9 prepared.

10 2. The reasonable interpretation of the language of the
11 memorandum, and consideration of the circumstances under which it
12 was prepared, is consistent with the preparation of comprehensive
13 Release and Settlement Agreement, with provisions, terms and
14 language appropriate to such a document:

15 The parties reached a settlement at a private mediation. It
16 was not feasible to then and there prepare a comprehensive,
17 formal agreement. Common to such a circumstance, a cursory,
18 bullet point memorandum was prepared, and signed by the parties,
19 to make the settlement binding, with an express proviso that
20 defendant would thereafter provide a Release and Settlement
21 Agreement. It is reasonable that the Release and Settlement
22 Agreement would include provisions, terms and language

23 _____
24 unspecified matters related to a misidentified insurance policy.

25 Likewise, the Agreement contained language of
26 confidentiality, which set forth, with particularity, what was
27 encompassed as being confidential, and who and under what
28 circumstances confidential matters could and could not be
disclosed. Plaintiff's attorney demanded that the that language
of confidentiality consist of one sentence, which said that the
terms of settlement were confidential.

1 appropriate to such a document, the preparation of such a
2 document is consistent with the wording of the memorandum and the
3 circumstances under which it was prepared, and there is nothing
4 in the language, or those circumstances, which is inconsistent
5 with such a thing.

6 3. His assertion that the five sentence memorandum was the
7 Agreement is contrary to the language of the memorandum. The
8 memorandum doesn't say that it was the Release and Settlement
9 Agreement. It says defendant would be providing a Release and
10 Settlement Agreement.

11 4. Further, the memorandum does not say that the Agreement
12 could only consist of a literal recitation of the five, bullet
13 point sentences, set forth in the memorandum. In fact, it doesn't
14 place any limitations on the provisions, terms or language of the
15 Agreement, other than to say that it will contain a provision for
16 confidentiality.

17 5. For the same reasons set forth in 2, above, his
18 assertion that the five sentence memorandum was the Agreement,
19 and that the Agreement cannot contain anything other than a
20 literal recitation of the five, bullet point sentences, set forth
21 in the memorandum, is inconsistent with a consideration of the
22 circumstances under which the memorandum was prepared.

23 6. His assertion was inconsistent with his own prior letter,
24 wherein he said that he only had a problem with the language of
25 two of the provisions of the Agreement.

26 7. The memorandum said that defendant would provide language
27 of Release. The Agreement contained language of release, which

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1 set forth, with particularity, the releasee, the releasor, and
 2 the matters released.¹⁴ Defendant has the right to have language
 3 of release which was full, complete, and reasonable. Plaintiff's
 4 demand that the language of release consist of a single sentence
 5 of release, which says something about some unidentified releasor
 6 being released from some unspecified matters related to a
 7 misidentified insurance policy, was vague, incomplete, and
 8 essentially meaningless.¹⁵

10 ¹⁴ "3. As consideration for the payment of the sums
 11 specified in paragraph 1, Plaintiff does hereby release, acquit
 12 and forever discharge the Released Parties, of and from any and
 13 all claims, demands, disputes, losses, or causes of action, known
 14 or unknown, foreseen or unforeseen, in law or in equity, which
 15 the Plaintiff has, has ever had, may ever have, or which may
 16 hereafter accrue or be acquired, against the Released Parties,
 17 relating to or concerning the Policy, and any claims which were
 18 or could have been asserted in the Action. Plaintiff further
 19 covenants and agrees that neither she nor anyone authorized to
 20 act on her behalf will commence, authorize, or accept any benefit
 21 from any judicial or administrative action or proceeding, other
 22 than as expressly provided for in this Agreement, against the
 23 Released Parties, or any of them, in either their personal or
 24 corporate capacity, with respect to any claim, matter, or issue
 25 that in any way arises from, is based on, or relates to any
 26 alleged loss, harm, or damages allegedly caused by the Released
 Parties, or any of them, in connection with the released claims
 referenced in this paragraph and paragraph 5 of this Agreement."

"4. The release and covenant not to sue set forth in
 paragraph 3 above specifically includes, but is not in any way
 limited to: (a) any and all claims against the Released Parties
 on account of, arising out of, or in any way relating to the
 Policy; (b) any and all claims against the Released Parties on
 account of, arising out of, or in any way relating to the Action;
 (c) any damages which were or could have been claimed in the
 Action including, but not limited, any extra-contractual damages
 suffered at any time by reason of any of the conduct alleged in
 the Action, or the continued effects thereof, or as referenced in
 (a) and (b) of this paragraph."

¹⁵ "Releasor Pamela Thompson acknowledges and agrees that
 this release applies to all claims that Releasor may have against

1 8. The memorandum said that defendant would provide a
 2 provision for confidentiality. Defendant has the right to have
 3 language of confidentiality which was full, complete, and
 4 reasonable. The Agreement provided by defendant contains
 5 language of confidentiality, which set forth, with particularity,
 6 the what is encompassed as being confidential, and who and under
 7 what circumstances confidential matters could and could not be
 8 disclosed.¹⁶ The single sentence of confidentiality demanded by

9 _____
 10 Releasee [nowhere defined] arising out of Transport Life
 11 Insurance company Policy of Insurance No. 1101-CA [which is not
 12 a correct identification of the subject policy] for injuries,
 13 damages, or losses to Releasor's personal and property, real or
 14 personal [whatever that means], whether those injuries, damages
 15 or losses are known or unknown, foreseen or unforeseen, or patent
 16 or latent [whatever that means]."

17 ¹⁶ "16. Plaintiff and her attorneys in the Action agree that
 18 the terms of this Agreement (including but not limited to the
 19 amount of the payment recited herein and the basis on which said
 20 payments are computed), the nature and circumstances of the
 21 dispute between the parties, and the factual background of the
 22 Action, are confidential. Plaintiff and her attorneys in the
 23 Action further understand and agree that while each may state
 24 that a settlement has been reached, except as provided in this
 25 paragraph, they may not disclose confidential information, to
 26 third parties, orally or in writing.

27 Confidential information shall not be disclosed, revealed,
 28 or divulged, by plaintiff or her attorneys, to any person, firm,
 corporation, news media, or to any other entity whatsoever, with
 the following exceptions, and then only to the extent reasonably
 necessary: (a) to governmental taxing authorities; (b) to
 plaintiff's and her attorneys' accountants and tax preparers; (c)
 when required by order or a court of competent jurisdiction or
 otherwise compelled by law, or; (d) with the prior written consent
 of all parties.

 No party or their attorneys shall categorize this Agreement
 or the outcome of the Action as a victory for themselves, or a
 defeat of the other party, or suggest that this Agreement, or the
 terms thereof, constitute something other than the settlement of
 a dispute without an admission or finding of liability on the
 part of either party.

1 plaintiff's attorney - that the terms of the settlement are
 2 confidential, is even more vague, incomplete, and meaningless
 3 than his demanded language of release ¹⁷ It doesn't even say what
 4 confidentiality is, or means - i.e. that confidential information
 5 cannot be disclosed. It doesn't encompass plaintiff's attorney.
 6 Further, it doesn't encompass the facts and circumstances of the
 7 case.¹⁸ (Ex. 12; Wodin Dec.)

8 Defendant's attorney concluded the letter requesting, for
 9 the fourth time, that they meet and confer in an attempt to
 10 resolve these issues. (Ex.12; Wodin Dec.)¹⁹

11 Once again, plaintiff's attorney ignored the request. (Wodin
 12 Dec.)

13 Accordingly, on August 4, 2008, defendant filed a
 14 Certification that plaintiff had not delivered agreed upon
 15 consideration for the settlement, and requested that the
 16 dismissal be vacated, and the action be restored to the calendar.
 17 On August 11, 2008, the court issued an order vacating the
 18 dismissal, and setting a status conference. (Exs. 13-14; Wodin
 19

20 The promises of confidentiality as provided in this
 21 paragraph are material inducements to Defendant to enter into
 22 this Agreement and are of the essence of this Agreement."

23 ¹⁷ "The parties agree that the terms of the settlement are
 confidential."

24 ¹⁸ Defendant's attorney told plaintiff's attorney, at the
 25 mediation, that confidentiality would encompass the settlement
 and the facts and circumstances of the action. (Wodin Dec.)

26 ¹⁹ "I continue to be open to discussing modification of the
 27 release and settlement agreement which I provided to you, if you
 28 have some problem with the specific language therein."

1 Dec.)

2 1. This court should order plaintiff's attorney to meet and
3 confer - meaning to communicate directly and discuss in good
4 faith - on the language of the Release and Settlement Agreement
5 as provided by defendant's attorney.

6 The memorandum signed by plaintiff and her attorney says
7 that defendant would provide a Release and Settlement Agreement,
8 which plaintiff and her attorney would sign. Defendant's
9 attorney provided such a document to plaintiff's attorney, and
10 offered, four times, to meet and confer with plaintiff's attorney
11 with regard to any problems he has with the language of that
12 document. He has refused to do so. He should be ordered to do so.

13 2. Additionally, or in the alternative, this court should
14 enforce the settlement, by ordering plaintiff and her attorney to
15 sign the Release and Settlement Agreement provided by defendant's
16 attorney, with any modifications the court deems appropriate,
17 and/or enter judgment under the terms of such Release and
18 Settlement Agreement.

19 An agreement to settle is interpreted according to the
20 principles applicable to contracts generally, which means that
21 the court will seek to effectuate the intent of the parties,
22 based on a consideration of the language of the agreement and the
23 surrounding.

24 The parties mediated this case at the office of the mediator
25 and reached a settlement. It was not feasible to then and there
26 prepare a formal, written settlement agreement, and the parties
27 and their attorneys signed a cursory, five sentence memorandum,

28

1 which stated essential terms of settlement, to make the
2 settlement binding, with the express proviso that defendant would
3 prepare a Release and Settlement Agreement, which plaintiff and
4 her attorney would sign.

5 Defendant's attorney told plaintiff's attorney that
6 defendant had a standard agreement, and thereafter provided him
7 with such an agreement, modified, in certain respects, for the
8 particulars of the settlement, and with provisions, terms and
9 language usual and appropriate to such a document.

10 When plaintiff's attorney wrote, questioning the language of
11 two of the provisions, defendant's attorney wrote back that he
12 was happy to consider changes to the Agreement, and requested
13 that he call, so that they could discuss the matter. Plaintiff's
14 attorney did not respond to that request, and two follow up
15 requests.

16 Rather, he then took the position (inconsistent with his
17 prior position, wherein he only expressed concern about two of
18 the provisions) that the five sentence memorandum, was the
19 settlement agreement, and there could be no settlement agreement
20 prepared, stating the terms of settlement, in comprehensive
21 detail, with provisions, terms and language appropriate to such a
22 document.

23 Plaintiff's position concerning language of release and
24 confidentiality is also unreasonable. The memorandum says that
25 defendant would provide a "Release" and Settlement Agreement
26 which would include a provision for confidentiality. The
27 Agreement provided by defendant's attorney included detailed,

comprehensive language related to each of these things.
 Plaintiff's attorney - who has, again, refused to even meet and
 confer on this language - demanded that release and
 confidentiality each be covered by single sentences, which are
 vague, incomplete, and essentially meaningless.

**III. Sanctions Should Be Imposed On Plaintiff's Attorney And/Or
 Plaintiff For Their Conduct In Necessitating This Motion.**

28 U.S.C. § 1927 "allows a district court to award excess
 costs and attorney's fees reasonably incurred due to the
 unreasonable and vexatious multiplication of the proceedings by
 an attorney."

Such sanctions are properly awarded where an attorney
 engages in "obstructive conduct" or acts in "bad faith,"
 requiring the bringing of a motion to enforce a settlement.
Bright Beginnings, Inc. v. Care Comm, Inc. supra, p. at p. 4. See
 also Hubbard v. Yardagte Town, Inc. 2006 WL 1369085 (S.D.Cal.
 2006) at p. 3

In the present case, plaintiff and her attorney - but
 particularly her attorney - have engaged in a pattern of
 "obstructive" and "bad faith" conduct which merits the imposition
 of such sanctions:

- refusing four written requests from defendant's attorney
 to meet and confer to resolve any differences over language of
 the Release and Settlement Agreement, provided to plaintiff's
 attorney by defendant's attorney, pursuant to the memorandum of
 settlement prepared at the time of the mediation, and;

1 - asserting, contrary to the language of the memorandum, and
 2 the circumstances under which it was prepared, that the five
 3 sentence memorandum, prepared at the mediation, is the settlement
 4 agreement, and there can not be a comprehensive Release and
 5 Settlement Agreement.

6 Further, the court otherwise has authority to order a
 7 plaintiff, and/or the plaintiff's attorney, to pay sanctions,
 8 for conduct which necessitates the defendant bringing a motion to
 9 enforce a settlement. Doi v. Halekulani Corp., supra, p. 1140-
 10 1141; TNT Marketing, Inc. v. Agresti 796 F. 2d 276, 279 p. 278-
 11 279 (9th Cir. 1986). See also Grinzi v. Barnes 2005 WL 3434871
 12 (N.D.Cal.); Alden v. University of San Diego 967 F. 2d 583 (9th
 13 Cir. 1992)

14 Defendant's attorney bills at the rate of \$160/hour on this
 15 matter, and spent 25 hours preparing this motion. He anticipates
 16 that 5 hours will be spent traveling to court for the hearing on
 17 this motion. (Wodin Dec.)

18 DATED: September 2, 2008

LAW OFFICES OF MARC J. WODIN

20 By /s/ Marc J. Wodin

MARC J. WODIN

21 Attorneys for Defendant CONSECO
 22 SENIOR HEALTH INSURANCE COMPANY
 23
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 25
 26
 27
 28